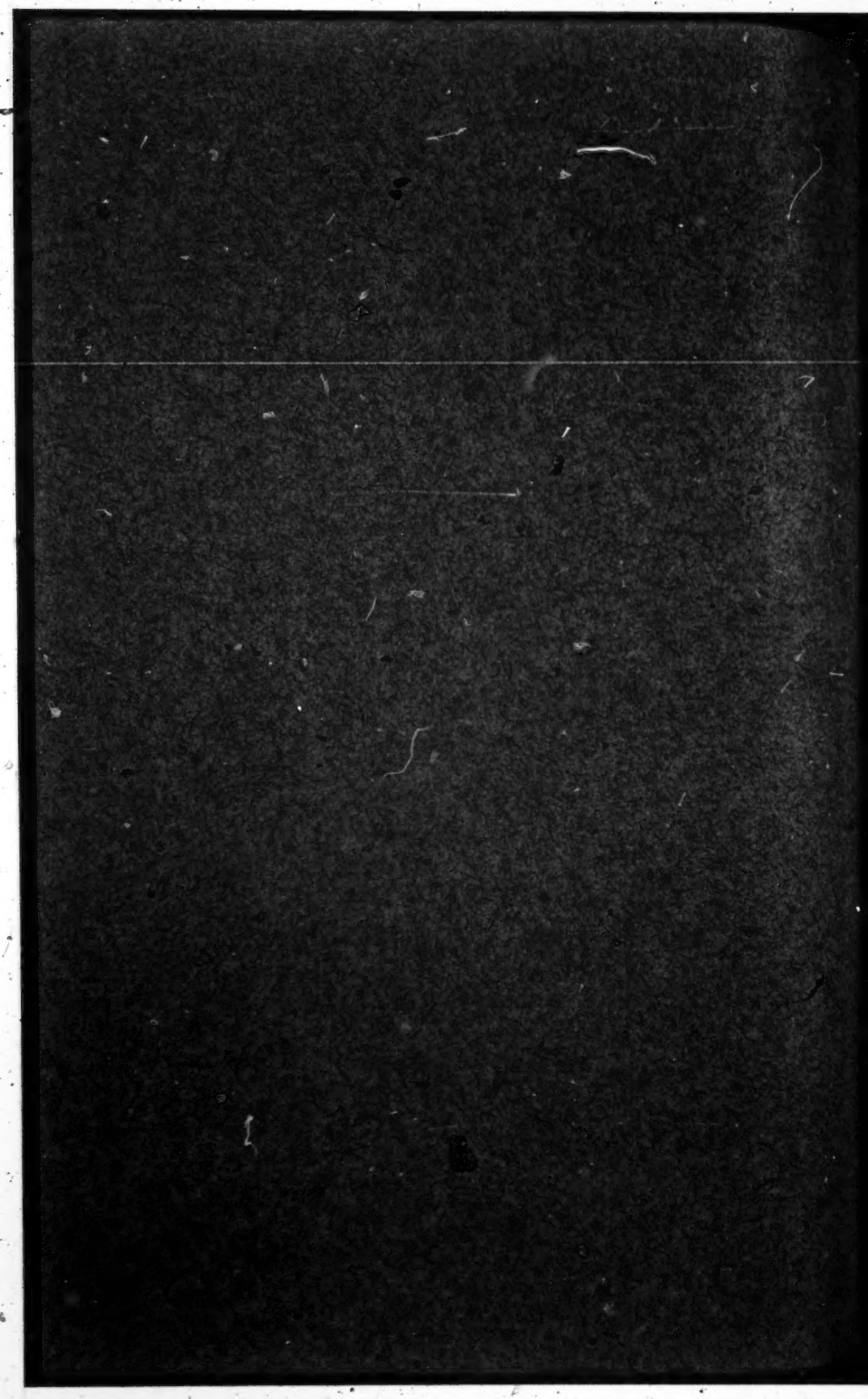

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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Index

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	3
1. The Federal question involved in this proceeding has been determined by this court adversely to petitioner (*News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179). The decision of the State Court is squarely in accord with the decision of this court	3
2. The respondent fulfilled its duty under the Interstate Commerce Act, as interpreted in the *News Syndicate Case*, in that it maintained a reasonable rate applicable to that part of the transportation of complainant's shipments which took place within the United States	9
3. Respondent, having fulfilled its duty, under the Act, to maintain a reasonable rate applicable to the transportation service performed within the United States, committed no violation of the Act in collecting charges based upon the international through rate	16
CONCLUSION	20

Table of Cases Cited

	Pages
Armour Packing Co. v. U. S. (1908), 209 U. S. 56, 81; 52 L. ed. 687	13
B. & O. S. W. R. R. Co. v. Settle (1922), 260 U. S. 166; 67 L. ed. 189	9
Boston & Maine R. R. Co. v. Hooker (1913), 233 U. S. 97, 110; 58 L. ed. 868	13
International Nickel Co. v. Director General, 66 I. C. C. 627	13
L. & N. R. R. Co. v. Maxwell (1915), 237 U. S. 94, 97; 59 L. ed. 853	13
News Syndicate Co. v. N. Y. C. R. R. Co., et al. (1927), 275 U. S. 179; 72 L. ed. 225	4, 6
U. S. v. Mo. Pac. R. Co. (1929), 278 U. S. 269; 73 L. ed. 322	13

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PRELIMINARY STATEMENT.

The petitioner seeks to have this court review the decision of the District Court of Appeal of California, First Appellate District, Division 2, in *Lewis-Simas-Jones Company v. Southern Pacific Company* (June 16, 1930), 289 Pac. 643. That decision was affirmed by the California Supreme Court, through refusal to grant the plaintiff and appellant (petitioner here) a

hearing of the cause, after rehearing had been denied by the District Court of Appeal.

The decision of the District Court affirmed a judgment rendered by the Superior Court of California in a suit brought by petitioner, as plaintiff, to enforce payment of an award of reparation made by the Interstate Commerce Commission in *Lewis-Simas-Jones Co. v. Southern Pacific Co.* (1925), 102 I. C. C. 45. The Commission undertook to order respondent to pay reparation for the assessment of asserted unreasonable charges upon three carload shipments of cow peas which moved during November, 1923, from Navojoa, Sonora, Mexico, over the lines of the Southern Pacific Railroad Company of Mexico to the international boundary line at Nogales, Arizona, and thence over the lines of the respondent to San Francisco, California. An international through joint rate of $1.33 per 100 pounds was applied. The Commission, although stating in its opinion that it possessed no jurisdiction to prescribe a reasonable international rate for the future, undertook to determine that the rate charged had been unreasonable in the past, to the extent it exceeded 94 cents, and to order respondent to pay to the petitioner the difference between the charges collected, and those which would have accrued under the rate last named.

The respondent contended at the trial that the Commission's order was void for lack of jurisdiction. It proved that at all times during which the shipments moved it had maintained a rate applicable to that

part of the transportation of the petitioner's shipments which took place within the United States (i. e., from the international boundary line at Nogales, Ariz., to San Francisco), which was neither alleged, nor proved, nor found, in the proceeding before the Commission, to have been unreasonable, and which was in fact at all such times reasonable and lawful. The trial court sustained respondent's contention, made appropriate findings, and entered judgment in its favor as heretofore stated.

ARGUMENT.

1. The Federal question involved in this proceeding has recently been determined by this court adversely to petitioner (News Syndicate Co. v. N. Y. C. R. R. Co., 275 U. S. 179). The decision of the State Court is squarely in accord with the decision of this court.

Paragraph 5(a) of Rule 37 of the Revised Rules of this court, as far as material here, provides:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The federal question of substance involved in this proceeding is whether the Interstate Commerce Commission possesses jurisdiction to inquire into and determine whether an international joint through rate, assessed upon shipments moving from a point upon a foreign railroad in an adjacent foreign country to a United States destination, a United States carrier being a party of the through rate, has been unreasonable in violation of Section 1 of the Interstate Commerce Act, and to make an order authorizing and requiring the United States carrier to pay, as reparation, the difference between the charges collected under that rate and those which would have accrued under a rate deemed by the Commission to have been reasonable; *it being made to appear affirmatively that the United States carrier performing the transportation service from the point upon the international boundary line where the shipments entered the United States to their destination has maintained contemporaneously a reasonable and lawful domestic rate upon the traffic in question, applicable from the boundary line to the United States destination.*

As pointed out by the court below (Tr., p. 78), the question is not as to the powers of Congress, under the Constitution, to regulate international commerce, but whether the jurisdiction assumed by the Commission has been conferred and now exists, under the Interstate Commerce Act. That question has been fully and finally settled by the decision of this court, in

News Syndicate Co. v. N. Y. C. R. R. Co., et al. (1927), 275 U. S. 179; 72 L. ed. 225.

In the proceedings out of which that case arose, the international rate assessed upon certain shipments which moved from a point in Ontario, via the Niagara frontier, to New York City, was found unreasonable by the Commission, and reparation was awarded. The case therefore resembles the instant case quite closely; but there is one essential distinction which, in view of the express language of the opinion, becomes of controlling importance: namely, that whereas in the *News Syndicate Case* the United States carriers parties to the through rate and transportation had failed to publish or maintain *any rate whatsoever, reasonable or otherwise,* from the international boundary line to New York City, in this case the respondent, the United States carrier which transported petitioner's shipments from the international boundary to their destination, maintained at all times during the period of movement a rate from the boundary line to San Francisco, applicable upon those shipments, which was reasonable and lawful.

In its brief (pp. 6-8) petitioner makes lengthy reference to the questions certified to this court by the Circuit Court of Appeals for the Seventh Circuit in the *News Syndicate Case,* and to the categorical answers thereto made by this court, but omits all reference to the opinion which precedes those answers. Apparently petitioner considers the lengthy discussion which explains the basis for the court's unanimous conclusions to be mere surplusage, entitled to no respect, and believes that the lower court erred in hav-

ing quoted and relied upon those portions of this court's opinion.

In connection with its reply to the first question certified in the *News Syndicate Case,* this court said (275 U. S., at pp. 186 et seq.):

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York city. Section 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); Section 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville & N. R. Co. v. Sloss-Sheffield Steel & I. Co.,* 269 U. S. 217, 231, 70 L. ed. 242, 249, 46 Sup. Ct. Rep. 73. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof.' Section 16(1). And it was the duty of the Commission to ascertain

the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted."

It will be particularly noted that this court did not declare that the publication and maintenance of the joint through rate found unreasonable was a violation of the Interstate Commerce Act, but that it was "the failure to establish rates covering the transportation from the international boundary" line which contravened the Act and caused the shipper to be damaged.

In its discussion of its reply to the second question this court said (275 U. S., pp. 187, 188):

"The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Therold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, Section 13 (1), and had jurisdiction to make the

order. Section 16 (1). The question should be answered in the affirmative."

It will be observed that this court emphasized especially that the violation of the Interstate Commerce Act, from which the damages flowed, lay in the failure of the United States carriers to maintain *any* rate applicable to the transportation within the United States of the shipments in question. If such a rate had been maintained, meeting the requirements of the Act, there would have been no violation of law upon which the Commission might predicate an award, for that Commission can award damages *only for violations of the Act* by carriers subject to its jurisdiction.

In the instant case, as fully appears from the record, and particularly from the opinion of the lower court, respondent fulfilled the requirements of law set forth by this court in the *News Syndicate Case*. That decision has been recognized as defining completely the character of the duty laid upon a United States carrier which participates in the transportation, under an international through rate, of shipments from a point in an adjacent foreign country to a domestic destination, and the circumstances under which the Commission may award reparation for the assessment of an international rate. The decision of the lower court is based squarely upon, and conforms directly with, the pronouncements of this court. There is no sound reason for the issuance of the writ prayed for by petitioner.

2. The respondent fulfilled its duty under the Interstate Commerce Act, as interpreted in the News Syndicate Case, in that it maintained a reasonable rate applicable to that part of the transportation of complainant's shipments which took place within the United States.

At pages 8 and following of its brief, petitioner attempts to avoid the application of the principles laid down in the *News Syndicate Case,* by arguing that although respondent maintained a rate applicable to carload shipments of petitioner's commodity from the international boundary line at Nogales to San Francisco, that rate was not applicable to complainant's shipments moving from a point in Mexico; that consequently respondent failed in the duty laid upon it by the Act, as construed in the *News Syndicate Case,* to maintain a reasonable rate applicable to that part of the transportation which took place within the United States; and that therefore the Commission was empowered to exercise jurisdiction in the same manner as in the proceedings which led to the *News Syndicate Case.*

In this connection petitioner refers to the international joint through rate, and asserts that the publication of that rate made it the *only* rate which could have applied under the law, citing:

B. & O. S. W. R. R. Co. v. Settle (1922), 260 U. S. 166; 67 L. ed. 189.

In that case it was held that, *under the Interstate Commerce Act,* the publication of a through rate between any two points (subject to the Act) makes

that rate alone applicable, and that possible combinations of intermediate local rates cannot be applied in lieu of the published through rate. However, the *Settle Case* has reference only to transportation between points in the United States coming wholly within its scope. The Act, by the very terms of Section 1, (pars. 1, 2) does not apply to the *entire* transportation of a shipment from an adjacent foreign country to a destination in the United States, and cannot apply to the service performed before the shipment reaches the boundary line. It can and does apply, as this court said in the *News Syndicate Case*, only to the service performed from the international boundary line to the United States destination. The rule of the *Settle Case* could not be invoked to prevent the application, for example, of the local rate of the Mexican carrier from the Mexican point of origin to the point upon the boundary line at which the shipment entered the United States, and subsequently of the local rate of the United States carrier from the latter point to the United States destination. As applied to the *instant* case the decision in the *Settle Case* simply means that for transportation *coming within the scope of the Act* only a rate named in tariffs filed with the Commission can be used. That rate, however, might be either the international rate, which the petitioner paid, or the domestic rate from Nogales to San Francisco, which was also published, and available to the petitioner. Certainly the rule of the *Settle Case* does not import that the scope of the Act must or can be extended beyond the boundary line, contrary to

the express limitations of Section 1, into the territory of the adjacent foreign country, so as to compel shippers there to use, and foreign carriers to observe, a published joint through rate as the *only* applicable rate, or forbid a shipper from billing shipments originating in Mexico at the local rate from point of origin to the boundary line, and rebilling thence to a United States destination at the domestic rate. Nor can there be any violation of the Act if the United States carrier accepts a shipment tendered at the boundary line, and transports it to a United States destination at the domestic rate.

The language of this court in the *News Syndicate Case* affords a complete and conclusive answer to petitioner's argument in this connection. In the answer to the second question this court particularly pointed out that the failure of the carriers there before it to comply with the Act, by establishing a just and reasonable rate for the transportation service from the boundary line to the United States destination, compelled the shippers to pay charges based on the through rates. The conclusion is obvious that if a reasonable domestic rate had been available, the shipper would not have been compelled to pay the international rate, but instead could have used the domestic rate, which would have been as properly applicable as the international rate, at the shipper's election.

Petitioner cites (Brief, p. 11) three decisions of the Commission issued since the *News Syndicate Case*

was decided in which, so it is stated, the Commission holds that it may award reparation against international rates, regardless of the maintenance of rates applicable to the transportation service performed within the United States. In those proceedings, surprising as it may seem, the Commission has asserted that its conclusions are based upon the principles laid down in the *News Syndicate Case.* It is unnecessary to discuss those decisions at length. To the extent that the Commission undertakes to award reparation against alleged unreasonable international rates, regardless whether rates are maintained applying to the transportation service to or from the international boundary line, its decisions are erroneous, and in direct conflict with the essential principle of the decision upon which they purport to rely.

Other decisions of the Commission cited by petitioner (Brief, pp. 11, 12) were decided prior to the *News Syndicate Case,* and obviously possess no more authoritative weight than the decision upon which petitioner's suit is based. The controlling principles which apply here have been sufficiently laid down in the *News Syndicate Case;* and their applicability cannot be avoided by the multiplication of citations of decisions of the Commission. It may be noted, however, that while the Commission has from time to time undertaken to exercise jurisdiction in cases of this kind, it has done so with the primary purpose of obtaining final and authoritative rulings from the courts defining the extent of its powers. In many cases vigorous dissenting opinions have been regis-

tered; and in at least one case cited by petitioner (*International Nickel Co. v. Director General*, 66 I. C. C. 627) it was expressly stated that the Commission desired the matter to be carried into the courts, so that it might obtain proper guidance in future cases. In any event, the Commission's persistence in an erroneous construction and application of the Act, particularly after it has been fully interpreted by this court, though possibly somewhat surprising, cannot be permitted to prevail as against the definite pronouncements of this court, or impose liabilities or duties when none exist under the statute.

> *U. S. v. Mo. Pac. R. Co.* (1929) 278 U. S. 269; 73 L. ed. 322 (and see the exhaustive annotation which accompanies the report of this case in Lawyers' Edition, relative to the doctrine of practical construction of statutes).

Petitioner asserts that unless the rule of the *Settle Case* be held to apply, so as to compel foreign carriers to observe the Act as controlling their operations and charges, the central and controlling purpose of the Act will be defeated, in that there will be exceptions to the rule that there must be only one rate for the similar carriage of freight, which rate must be charged. It cites:

> *Armour Packing Co. v. U. S.* (1908), 209 U. S. 56, 81; 52 L. ed. 687;
>
> *Boston & Maine R. R. Co. v. Hooker* (1913), 233 U. S. 97, 110; 58 L. ed. 868;
>
> *L. & N. R. R. Co. v. Maxwell* (1915), 237 U. S. 94, 97; 59 L. ed. 853.

These cases all involved primarily transportation between points in the United States; none of them involved transportation from a point in an adjacent foreign country, by an all-rail route, to a United States destination. Moreover, they all arose prior to 1920, when Congress amended the Act so as to provide expressly that it should apply to the transportation of shipments from or to an adjacent foreign country, *only in so far as such transportation takes place within the United States.* Compare Section 1 of the Act as it existed prior to 1920 (36 Stat. L. 544), with the corresponding section as it now reads (U. S. Code, tit. 49, Sect. 1 (1, 2); 41 Stat. L. 474).

However, refusal to extend the rule of the *Settle Case* into Mexico, so as to control the rates to be applied there, does not result in defeating the central purpose of the Act. Both the international rate and the domestic rate from the boundary line were equally known and available to petitioner, being published in tariffs duly on file. If petitioner believed that the international rate was unreasonable, it could readily have avoided its assessment by causing its shipments to be billed from the Mexican point of production to the boundary line, and thence re-billed at the domestic rate. If the latter rate were objectionable, petitioner had a ready remedy, for it was admittedly subject to the jurisdiction of the Commission, which could require the carrier assessing it to pay reparation to the extent that it might exceed a reasonable figure.

Petitioner also asserts that the domestic rate could not have been applicable because it was not charged

and applied; that if it were applicable, the respondent violated the Act by its failure to apply that rate instead of the international through rate. That assertion depends upon the premise that once the domestic rate is determined to be applicable, it becomes the *only* applicable rate, from which there can be no departure. That premise depends in turn upon the assumption that the rule of the *Settle Case* governs the entire transportation service. Since that rule does not control, as already shown, petitioner's argument has no foundation, and needs no further reply. However, it may be noted that petitioner is apparently attempting to inject into the case a new issue not presented by the pleadings. In its complaint in the trial court, petitioner charged respondent with a violation of Section 1 of the Act only, in that an *unreasonable* rate had been assessed. It is now apparently attempting to charge respondent with having violated Section 6, in that it has applied and collected some charge other than that contained in its published tariff. This accusation obviously has no foundation, for the reason that both the international rate (which was assessed), and the domestic rate (which was available to the petitioner at its election), were alternatively applicable, depending upon the shipper's choice.

The court below correctly decided that the respondent complied with its duty under the Interstate Commerce Act, as defined by the *News Syndicate Case,* in that it maintained a lawful and reasonable rate applicable to that part of the transportation service here involved which took place within the United States.

Therefore, that court properly applied the principles stated in that decision in concluding that the Commission was without jurisdiction to make the order upon which petitioner's action is founded.

3. Respondent, having fulfilled its duty, under the Act, to maintain a reasonable rate applicable to the transportation service performed within the United States, committed no violation of the Act in collecting charges based upon the international through rate.

In the concluding subdivision of its brief (pp. 12-16) petitioner argues in effect that the opinion in the *News Syndicate Case* does not define the legal requirements to be fulfilled by United States carriers who participate in and perform transportation service to which international through rates are applied. It is asserted that although, as the lower court held, respondent fully complied with the duty laid upon it under the Act as interpreted by this court, in publishing and maintaining a reasonable domestic rate from the boundary line to the United States destination, it nevertheless violated the Act by collecting charges based upon the international rate afterwards declared by the Commission to have been unreasonable, and thereby inflicted upon the petitioner legal damage which the Commission was empowered to recognize.

This argument rests upon the essential, but fallacious, premise that the international rate was, in a legal sense, unreasonable, and therefore in violation of the Act. Petitioner must necessarily assume that

the Act applies to and controls that rate *in its entirety*, and that the Commission can extend its jurisdiction beyond the international boundary, into the adjacent foreign country, and determine whether the through rate, though applying in part to transportation service performed by a foreign carrier, operating in a territory admittedly not within the scope of the Act, is *as a whole* unreasonable. The Act has no such application. By its very terms, it can and does apply to and control such an international transportation service only to the extent that it is performed within the United States; and the Commission therefore cannot undertake to determine whether the entire rate, as applied to the *entire* transportation, is or has been reasonable or lawful, but only whether a reasonable charge was made for the service rendered within the United States. In the instant proceeding, there was no allegation, proof, or finding that petitioner was charged an unreasonable amount for the service performed in the United States by respondent. In fact, the record completely fails to show what charge was made for that service, and no finding with respect thereto has ever been made, either by the trial court or by the Commission.

The record does, however, show that the respondent maintained, and held out to petitioner the opportunity to use, a reasonable rate from the boundary. It thus fulfilled its full duty under the Act as interpreted by this court in the *News Syndicate Case*. The petitioner chose not to accept that opportunity, although it might

thereby have avoided the damage of which it now complains; it elected instead to bill its shipments under the international through rate. Any damage caused by the assessment of the latter is therefore due entirely to petitioner's voluntary choice, and not to any violation of the Act by respondent.

In concluding its brief, petitioner asserts that the decision of the court below, if sustained, will operate to prevent the Commission from asserting any effective control over international through rates applied upon traffic to and from adjacent foreign countries. It offers a number of illustrations in which it portrays the results which it expects to follow. These illustrations all depend upon the erroneous view that the lower court has held that an international through rate is wholly free from the restraints of paragraph (5) of Section 1 of the Act; and the deduction drawn from that assumption, that if that portion of the statute is not controlling, other sections are likewise without application. The lower court made no such decision. It declared, in simple and direct language, that since the respondent complied with the duty placed upon it by the Act as construed by this court, the Commission, whose power to award damages can be exercised only when the Act has been violated, had no jurisdiction in the instant case. It did not undertake to declare that paragraph (5) of Section 1, or any other section of the Act, would not operate to restrain the publication and assessment of unreasonable or otherwise unlawful international rates under

circumstances other than those presented in the instant case: e. g., if no lawful rate applicable to the domestic transportation service were available, or if it were alleged and proved that an unlawful charge had been or would be exacted for transportation service performed within the United States, and thus within the statutory limits of the Commission's jurisdiction.

We have already pointed out that, as the lower court states in its opinion, the question here involved does not relate to the power of Congress under the Constitution, but to the jurisdiction conferred upon the Commission by the Act. That jurisdiction is limited, insofar as traffic to and from adjacent foreign countries is concerned, to the transportation service performed within the United States (Interstate Commerce Act, Section 1, paragraphs 1, 2). All of the concluding portion of petitioner's argument is addressed, not to the correctness of the conclusions reached by this court in the *News Syndicate Case* and by the lower court in the case at bar, relative to the meaning and application to be given to that limitation, but entirely to the propriety of the legislative action which placed it in the statute. The limitation must be given proper effect by the courts as long as it exists. Whether or not it should be a part of the Act is purely a question of legislative policy, which the Congress and not the courts must decide.

CONCLUSION.

Petitioner offers no adequate reason for the issuance of the writ prayed for. The federal question of substance here presented has been decided by the state court in exact conformity with the applicable and controlling principles set forth in this court's recent decision. The fact that the decision may not accord entirely with conclusions reached by the Interstate Commerce Commission in various cases before that tribunal is not a sufficient ground for review by this court. The petition should be denied.

Respectfully submitted,

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